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No. 71-105

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

In the Matter of the Last Will and Testament of Mary S. Allis, Deceased:

PAUL M. KUDER and
ELIZABETH A. BRAITHWAITE,
Trust Remaindermen,

Petitioners,

vs.

FIRST WISCONSIN TRUST COMPANY,
Trustee,

Respondent.

BRIEF IN REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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RAMSDELL-SHEPPARD REPORTING COMPANY — MILWAUKEE

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QUESTION PRESENTED

Petitioners have stated a question that might have been presented if a timely appeal had been taken to the Supreme Court of Wisconsin from an earlier judgment of the trial court, but the only question that is or can be presented on the present record is the following:

Whether a state court of last resort may, consistent with the due process of law required by the Fourteenth Amendment to the Constitution of the United States, refuse to entertain an appeal from a judgment dismissing a proceeding which is an attempted repetition of a previous proceeding wherein no appeal was taken by the petitioners within the time limited by law for appeal.

STATEMENT OF THE CASE

The petitioners' statement of the case, instead of being purely factual, is interspersed with argument concerning the "absolute constitutional right" of the petitioners, and the action of the trial court allegedly "contrary to the due process of law required by the Fourteenth Amendment" and upon an "erroneous ground." Aside from these argumentative conclusions which have no place in the statement of the case, the following inaccuracies and omissions are to be noted in the petitioners' statement of the case:

1. The statement on page 4 that the trustee refused to disclose its records and activities is refuted by an exchange of correspondence between the trustee and the petitioners' counsel in 1968 (R. 191-192) in which the trustee in its letter dated January 17 reminded counsel (and he admitted in his reply dated January 19) that all of its files had been made available to him in 1966, and further stated that they were again offered to him for re-examination.

2. The petitioners' statement of the case omits to mention that the accounts of the trustee were examined and allowed by the County Court of Milwaukee County on four separate occasions after hearings held upon notice to petitioners, namely in 1946 covering the years 1926 to 1945 inclusive; in 1952 for the years 1946 to 1951 inclusive; in 1962 for the years 1952 to 1961 inclusive; and in 1965 for the subsequent period ending with the death of the life beneficiary on May 20 of that year (R. 89-94). Likewise the petitioners failed to mention that the seven individual officers of the trustee whom they were accusing of wrongful acts and transactions twenty-five to forty-seven years prior to the filing of their petition with the County Court in 1968, were all long since deceased (R. 94-95), and that in eight separate paragraphs of their

petition to the County Court they accused their own mother of fraudulent collusion with the trustee to receive excessive income from the trust, although no such charge was made against her while she was alive and available to testify (R. 95);

3. The petition for certiorari fails to comply with paragraph 1(f) of Rule 23 of this court, which requires specification in detail of such portions of the record "as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

ARGUMENT

As noted in the statement of the case, the determination of the Supreme Court of Wisconsin which is sought to be reviewed by certiorari was not a determination that the proceeding instituted by the petitioners in the County Court of Milwaukee County was properly dismissed by that court; it was a determination that the petitioners had no right of appeal from that determination for the reason that the proceeding in County Court was an attempted repetition of an earlier proceeding in which they had failed to take a timely appeal. The trial court considered the second proceeding to be barred under the principle of res judicata; the Supreme Court of Wisconsin held that res judicata was not applicable, but the second proceeding was merely an attempt to obtain appellate review by instituting a new proceeding after the time for appeal in the first proceeding had expired.

Thus the only question that is cognizable by this court under the petition for certiorari is whether the petitioners were deprived of rights under the federal constitution when the Supreme Court of Wisconsin denied their right

of appeal. That the right of appeal within a state court system is not an element of due process but is purely a matter of grace has been so constantly and consistently affirmed by this court that as long ago as 1894 the court stated that a citation of authorities on the point was unnecessary. *McKane v. Durston,* 153 U.S. 684, 687-688, 14 S.Ct. 913, 914-915, 38 L.Ed. 867. In *National Union of Marine Cooks and Stewards v. Arnold* (1954), 348 U.S. 37, 43, 75 S.Ct. 92, 95, 99 L.Ed. 46, 51, the court cited cases all the way back to *McKane v. Durston,* and again stated that "while a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process." The certiorari that is sought in this case is to the Supreme Court of Wisconsin, and what is sought to be reviewed is the action of *that* court in refusing to entertain an appeal; not the action of the *lower* court in dismissing the petition for vacation of its previous orders which allowed the trustee's accounts. That latter action could have been reviewed if the petitioners had taken a timely appeal to the Wisconsin Supreme Court from the dismissal of their first petition, but they failed to do so, and their attempt to re-litigate the matter in a second proceeding was unsuccessful, and the refusal of the Wisconsin Supreme Court to entertain an appeal in the second proceeding leaves nothing for this court to act upon.

The petitioners attempted, it is true, to differentiate their second proceeding from the first one by asserting in their second petition that the dismissal of the first proceeding on the ground of laches was procured by a fraud upon the trial court. In support of that claim they relied upon a newspaper interview with an officer of the trustee at the time the first proceeding was dismissed, in which he is alleged to have said that the trustee could have

refuted all the claims of fraud if the case had not been dismissed on the ground of laches. The trial court in dismissing the second proceeding was unable to find any inconsistency between the statement attributed to the trustee's officer and the previous position of the trustee that its defense was made much more difficult by the long delay in requesting the relief sought (R. 208, A. 5a). The Supreme Court of Wisconsin not only agreed with the trial court in that respect but went on to say that "it is difficult to imagine how the optimistic statements could be taken as evidence that the prior assertions of prejudice were fraudulently made with the intention of deceiving the court" (A. 5a). The petition for certiorari states (page 10) that "it is unthinkable to state that there was no fraud without ever having had a hearing on the merits of the allegations of fraud." From this it would appear that the petitioners are claiming that they were deprived of constitutional rights by the failure to hold a hearing on the allegation of fraud stemming from the newspaper interview. However that may be, the fact remains that the trial judge, familiar as he was with the entire history of the Mary S. Allis estate and the many years of delay on the part of the petitioners in bringing their alleged grievances before the court, found no indication of fraud in the newspaper interview, and the Supreme Court of Wisconsin agreed with that finding. The trial judge's basis for determining that the long delay was prejudicial to the defense against the charges was stated as follows in his decision in the first proceeding (R. 103):

> "It does not seem necessary to dwell at length on the obvious adverse effect the delay on the part of the remaindermen has caused the trustee. The order to show cause relates to events that occurred from forty to three years ago. The life beneficiary is deceased and therefore cannot defend herself nor sup-

port the defense of the trustee. The court knows of its own knowledge that a number of the individuals named in the affidavit of the moving parties as participants in alleged transactions are deceased. These include Walter Kasten, L. J. Petit, Francis Bloodgood, Louis Allis, and Fred Best. Under the circumstances, the court finds that the third element of laches is present, that is, prejudice to the party asserting the defense."

In so holding, the trial court applied the rule established in the decisions of the Wisconsin Supreme Court relative to the element of prejudice in dealing with the question of laches of a party seeking equitable relief:

> "Especially will he not be permitted, after long delay and change in situation, to demand such equitable right if its then enforcement will work *any substantial measure of hardship, inconvenience, or embarrassment* to the other party such as would not have followed the prompt assertion of the right contended for."
>
> *McDonald v. Markesan Canning Co.* (1910), 142 Wis. 251, 258, 125 N.W. 444. (Emphasis supplied)

In the petition for certiorari it is argued that due process includes full opportunity to appear and to be heard, citing *Mullane v. Central Hanover Bank & Trust Company* (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and *Boddie v. Connecticut* (1971), 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2nd 113. The *Mullane* case involved the sufficiency of the notice given to the beneficiaries of a trust, upon the commencement of a proceeding for approval of the accounts of the trustees. No such question arises here, as the petitioners themselves were the moving parties in the proceeding. In the *Boddie* case the court pointed out that —

> "Due process does not, of course, require that the defendant in every civil case actually have a hearing

> on the merits. A state can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance. * * * What the constitution does require is 'an opportunity * * * granted at a meaningful time and in a meaningful manner * * * for a hearing appropriate to the nature of the case'."

The petitioners had such an opportunity at the time of their first petition; it is not claimed that they were denied the opportunity to present oral and written arguments to the County Court in opposition to the respondent's motion for dismissal of their petition on the ground of laches. The trial court in its decision on the first petition made reference to the briefs filed by the parties (R. 101), and the petitioners themselves in their second petition referred to the oral argument upon the first petition (R. 122). In the decision on the second petition the trial court referred to the hearing that was held upon that petition (R. 206). In the first proceeding the trial court concluded on the basis of the petition itself (R. 18-41) and the affidavit filed by the trustee (R. 89-97), and the judicial notice which the court was entitled to take with respect to its own records, that the petitioners had not made a case for relief because of their clearly demonstrated laches. To say that they nevertheless had the right to a trial on the merits, involving a lengthy inquiry into matters occurring over a period of more than forty years, would be equivalent to holding that the constitution of the United States forbids the dismissal of an action upon demurrer to the complaint or upon a motion for summary judgment. But we need not pursue this subject further because, as already pointed out, the determination of the Wisconsin Supreme Court which the petitioners are seeking to review upon certiorari did not reach the question of the propriety of the trial court's dismissal of the first proceed-

ing, or its dismissal of the second proceeding; the determination of the Wisconsin Supreme Court involved simply the petitioners' lack of standing to appeal from the second dismissal.

CONCLUSION

The determination of the Wisconsin Supreme Court which the petitioners seek to review by certiorari dealt solely with their right to take an appeal to that court from a judgment of the County Court of Milwaukee County — a subject involving only local law and no question of due process under the Fourteenth Amendment. Certiorari should therefore be denied without any inquiry into the correctness or incorrectness of the trial court's determination which the Supreme Court of Wisconsin refused to review; but if that determination of the trial court should be deemed open to scrutiny by this court, no question arises under the Constitution of the United States because there was no failure to accord the petitioners due process of law in the dismissal of the proceedings which they instituted in the County Court of Milwaukee County.

Respectfully submitted,

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